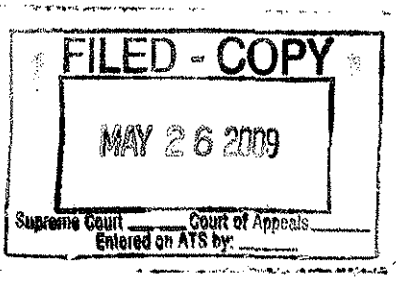
5-26-2009

Tower Asset Sub Inc. v. Lawrence Respondent's Brief Dckt. 35119

IN THE SUPREME COURT OF THE STATE OF IDAHO

SPECTRA SITE, LLC, Plaintiff-Respondent, vs. DOUGLAS P. LAWRENCE and BRENDA J. LAWRENCE, Husband and Wife, Defendants- Appellants	SUPREME COURT NO. 35119 RESPONDENT'S BRIEF



RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District
of the State of Idaho in and for the County of Kootenai

Honorable John T. Mitchell, District Judge presiding

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A. Nature of the Case

Spectra Site, LLC, ("Spectra Site") leases a parcel of property from Robert and Brenda Hall and Mark and Anne Hall located in the Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho. R pp. 147-162.[1] Defendants Doug and Brenda Lawrence, husband and wife ("Lawrence"), are the owners of a parcel of property located in the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho. At the time Lawrence acquired their parcel, there existed an unimproved road over, through and across the Lawrence parcel. R p. 142 (Answer to Complaint admitting paragraphs II and IV).

Tower Asset Sub, Inc. (Spectra Site's predecessor in the lease) filed a complaint June 27, 2003, seeking a finding it had an easement for ingress and egress under four alternative theories: express easement; implied easement; prescriptive easement; and/or an easement by necessity. The coplaint also sought an order of the trial court enjoining Lawrence from interfering with their rights as tenants to use the right of use of the unimproved road for access to its parcel. R p. 7-23.

[1] Since there are two appeals, the clerk's record prepared for Supreme Court Docket No. 32092 will be referred to as R and the record prepared for Supreme Court Docket No. 35119 will be referred to as Supp R herein.

B. Course of the Proceedings

This matter has previously been on appeal before this Court in *Tower Asset Sub Inc. v. Lawrence*, 143 Idaho 710, 709, 152 P.3d 581 (2007) seeking reversal of the district court's grant of summary judgment finding an express easement across Lawrence's property. This Court vacated the summary judgment and remanded the matter back to the district court for further proceedings. In its ruling, this court stated: "[w]e hold that Tower, as lessee of the alleged dominant estate, has standing to seek injunctive relief preventing the Lawrences from interfering with its alleged right to use the easement, but lacks standing to seek to quiet title to the easement."

Following remand, on May 14, 2007, Tower renewed its summary judgment motion citing to the above language from the Supreme Court's appellate decisions, and discussing the various easement rights which Hall had on the remaining easement theories. The relief requested was an injunction to prevent Lawrence from interfering with its use of the access road. Supp R Vol. I, pp. 23-46. On May 31, 2007, Lawrence filed for a motion for an enlargement of time to August 15, 2007 to respond to the motion for summary judgment because Lawrence required additional time to conduct discovery in response to the motion for summary judgment. Supp R Vol I, pp. 56-58.

On June 6, 2007, Lawrence's counsel filed a motion to disqualify the district court judge for cause and an application for an order shortening time to have the matter heard on the same date scheduled for the summary judgment hearing. Supp R Vol. I, pp. 82-86. Spectra Site did not object to the request to shorten time when the court heard the motion to disqualify

for cause on June 13, 2007. Because the motion to disqualify divested the trial court of jurisdiction to hear other motions, the motion for summary judgment did not proceed to hearing at that time as scheduled. Tr p. 4, Ll. 2-18. On June 25, 2007, the trial court issued a written decision denying the motion for disqualification for cause. Supp R Vol. I, pp. 95-120. A motion to reconsider was filed July 9, 2007, as well as a motion for permission to appeal. Supp R Vol. I, pp.125-130. An order denying these motions was entered August 2, 2007. Supp R Vol. II, pp. 351-352.

On July 24, 2007, Lawrence filed another motion for enlargement of time to November 1, 2007 to respond to Spectra Site's motion for summary judgment, again indicating additional time was required to conduct discovery. Supp R Vol. I, pp. 153-154. The motion was heard August 7, 2007. The trial court granted the motion for enlargement of time and continued the summary judgment hearing. Supp R Vol. III, pp. 457-459.

On November 27, 2007, the trial court heard Lawrence's renewed motion to appeal its denial of Lawrence's motion for an interlocutory appeal of the denial of the motion to disqualify the trial judge for cause. Tr p. 118. The summary judgment was heard November 28, 2007. Tr p. 159. On November 30, 2007, the trial court entered an order denying the renewed motion to proceed with an interlocutory appeal on the denial of the motion to disqualify. Supp R Vol. III, pp. 611-615.

The District Court issued its Memorandum Decision and Order Granting Plaintiff's Motion for Summary Judgment on February 6, 2008. Supp R Vol. III, pp. 616-754. This appeal followed.

C. Statement of Facts

In Lawrence's preface to their statement of facts, they claim that Spectra Site sought a summary judgment for quiet title. That assertion is not correct. Spectra Site asked the court to grant summary judgment and "issue a permanent injunction prohibiting Defendants from further blocking Plaintiff's access." Supp R Vol. I, p. 35 (Conclusion).

Lawrences brief contains irrelevant matters relating to Capstar Radio Operating Company (Supreme Court Docket No. 35120) and a conditional use permit. It also contains cites to the record on appeal in the Capstar case. Spectra Site submits that the facts relevant to this appeal pertain to its status as a tenant, and its landlord's rights to use the road. These rights derive from various easement theories argued at summary judgment, and the record which this court should consider on appeal are those contained in the clerk's record for this case.

In 1968, Pike and Agnes Reynolds sold Edward and Colleen Raden and Harold and Viola Marcoe several parcels of property, including the Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho and the adjacent Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho. The grant excluded a one acre parcel which had previously been conveyed to General Telephone Company ("GTC"), and was subject to easements granted to GTC over and across the Southwest Quarter of Section 22 and the Southeast Quarter of Section 21. R pp. 49-50.

In 1969, Harold and Marlene Funk ("Funk") entered into a purchase agreement with Edward and Colleen Raden and Harold and Viola Marcoe which included a sale of the

Southeast Quarter of Section 21, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho (hereafter "Section 21") and the adjacent Southwest Quarter of Section 22, Township 50 North, Range 5 West Boise Meridian, located in Kootenai County, Idaho except for the one acre parcel which had previously been conveyed to GTC in 1966 (hereafter "Section 22"). R pp. 51-52. The property was conveyed by a subsequent 1974 warranty deed. R p. 53-54. At the time Funks purchased the property in 1969, the GTC easement road was the only existing road providing access to the Funk's real property. R p. 27.

When Pike and Agnes Reynolds granted GTC its parcel in 1966 in Section 22, they included in the deed an easement over and across the Southwest Quarter of Section 22 and the Southeast Quarter of Section 21. R p. 83. GTC also obtained an easement from Glen and Ethel Blossom, husband and wife, over the Southwest Quarter of Section 21. R pp. 84-86. GTC also obtained an easement for ingress and egress to its parcel across the North Half of the Northeast Quarter of Section 28. R pp. 87-89. Thus, GTC had recorded easements over the entire easement road to its parcel.

In 1972, Funk purchased an easement from Wilbur Mead to that portion of the access road which crossed Mead's property in the Southwest Quarter of Section 21. Supp R Vol. III, pp. 645 (Dep. Tr. p. 43, Ll. 22-25; p. 44).

In 1975, Funk entered into a purchase agreement to sale the Lawrence parcel to Human Synergistics, Inc. The sale was evidenced by a recorded Sales Agreement. This sales agreement indicated that the sale was subject to and including ingress egress easement over the Lawrence parcel and adjoining property in sections 23 and 22 owned by Funk. R pp. 55-56. A

later warranty deed from Funk to Human Synergistics prepared in 1992 omitted reserving an easement over the existing access road. R p. 61.

In 1977, Human Synergistics sold the Lawrence parcel to Don and Fern Johnston, husband and wife, and John and Mary Ann McHugh, husband and wife pursuant to a recorded contract of sale. R pp. 57-58. A Corporation Deed for this sale was recorded in 1988. R. pp. 60-61.

In 1987, Johnston and McHugh sold the Lawrence parcel to National Associated Properties, Inc. pursuant to a memorandum of sale. R pp. 59-60. A warranty deed for the conveyance was recorded in August, 1998. R pp. 67-68.

In June 1996, National Associated Properties, Inc. conveyed the Lawrence parcel to Arman and Mary Jane Farmanian, husband and wife. R p. 62. On October 1, Farmanian sold the parcel to Lawrence pursuant to a recorded sale agreement.. R p. 64. A warranty deed from Farmanians to Lawrence was recorded August, 1998. R p. 69.

Doug Lawrence provided a depiction of the access road that is the subject of this litigation in his deposition taken in different litigation with Verizon Northwest (GTC's successor in interest) disputing rights to use the same access road. During the testimony, Lawrence provided a graphic detail of the access road to its parcel across the various sections property. R p. 92; 94. This depiction portrayed the GTC access road as commencing at the county road and passing in a northeasterly direction through Section 21, then taking a sharp turn southeasterly into Section 28, then changing direction in Section 28 in a course to the northeast, continuing through the southeast quarter of Section 21 for a short distance and

continuing generally in a northeasterly direction through Section 22 to its terminus at a tower site. R p. 92-93

A recorded survey of a portion of the access as it existed over and across Section 28 and the Southeast Quarter of Section 21 was placed in the deposition record. The survey was consistent with Lawrence's depiction of the GTC easement road. R p. 94.

Further, this access road was depicted by GTC's successor in interest, Verizon Northwest, Inc., on a U.S. Geological Survey Map as commencing at the public road (identified on the U.S. Geological Survey map as "Ski Lodge Road"), traversing across the Southwest Quarter of Section 21, traversing over and across into the East Half of the Northeast Quarter of Section 28; traversing through the Lawrence parcel in Section 21; and terminating in the Southwest Quarter of Section 22 at an area identified on the U.S. Geological Survey map as a "Radio Tower" on Blossom Mountain. R pp. 106-113; 121-122. The U.S. G.S. map shows a route nearly identical in course, direction and configuration of the access road identified by Lawrence in his deposition, and the sections over and across which it passed.

In 1977, Funk segregated and conveyed the Hall parcel to John Rasmussen and Neil Chamberlain. R p. 70-71. Rasmussen and Chamberlain conveyed the parcel to James and Teresa Van Sky in 1978. R. p. 78. Van Sky conveyed the parcel to Switzer Communications, Inc. in 1981. R. p. 79. In 1995, Switzer conveyed the parcel to Term Corp. In April, 1997, Term Corp., whose president was Robert Hall and secretary was Mark Hall, conveyed the parcel to Mark Hall and Robert Hall. R p. 82.

Funks sold the remaining Section 22 property to John Mack in 1992. R p. 139. The Section 22 property was subdivided into Blossom Mountain Estates in 1998. R p. 96.

On September 20, 1996, immediately prior to signing the Lawrence sale agreement, Farmanians entered into a mutual agreement, grant of easement and quit claim deed with Mack concerning their respective parcels. This agreement recited in relevant part that "MACK and MACK'S predecessors in interest have used a preexisting private road traversing the most southeasterly portion of the FARMANIAN PROPERTY to gain access to the MACK PROPERTY. This private road is sometimes known as Blossom Mountain Road (hereinafter referred to as the "ACCESS ROAD"). For illustrative purposes only, the approximate location of the ACCESS ROAD is depicted as a double dashed line on the Exhibit B, attached hereto and incorporated herein by reference. Exhibit A is an enlargement of the United States Geological Survey topographical map of the subject area."

This agreement referred to the access road as the historic location of the access road in more than one location. R pp. 102-105. Further, Exhibit "B" attached to the Farmanian/Mack deed depicted the road using a U.S. Geological Survey map very similar to that used by Verizon Northwest to portray the GTC access road. Thus, Farmanian and Mack recognized the GTC easement road as the historical access road being used by Funk and his successor, Mack , to access the Section 22 property.

Funk testified in his 2004 affidavit that when he purchased the property, the easement road that was used to access the property was the same road over which GTC had a recorded access easement. R p. 27. Consistent with his affidavit, Mr. Funk testified in his deposition in

August 2007 that the access road he used when first looking at the property was the GTE (General Telephone and Electric) access road. Supp R Vol. III, p. 531 (Dep. Tr p. 18, Ll. 10-13). There was one gate on the road. Supp R Vol. III, p. 531 (Dep. Tr p. 18, Ll. 25; p. 19, Ll. 1-11). Mr. Funk and the realtor drove to the GTE facility using the access road. Supp R Vol. III, p. 361 (Dep. Tr p. 19, Ll. 15-25; p. 20, Ll. 1-8.) When Mr. Funk passed over the property he didn't own he thought he had a right to do so based upon the Mead easement he obtained. Supp R Vol. III, p. 536 (Dep Tr p. 53, L.3-25; p. 54). In the six year period before selling the Lawrence parcel, Funk went to the property 20-30 times himself to target practice and pick huckleberries. Supp R Vol. III, p.532 (Dep. Tr. p. 25, Ll. 11-25; p. 26, Ll. 1-5). When Funk visited the property, he used the GTE road and went to the GTE tower site. Supp R Vol. III, p. 536 (Tr. p. 53, Ll. 1-24).

Robert Hall testified the site was leased to Tower Asset Sub. R pp. 147-162. Tower Asset Sub, Inc. merged into Spectra Site in 2007. Supp R Vol. III pp. 557-559. Upon motion, the district court substituted Spectra Site in as the real party in interest. Supp R p. 616.

Hall testified that when Term Corporation purchased in 1995, there was only one road to the property which also provided access to neighboring properties owned by General Telephone and Kootenai Electric Company. After Term purchased the property, it allowed Switzer Communications to continue to operate a communication facility that it had on the property. Hall testified that in 1997, they leased a portion of the property to Nextel, whom assigned the lease to Tower Asset Sub in 1999 (now Spectra Site).

IV. ARGUMENT

A. Standard of Review

The Court of Appeal recently reiterated the standard of review in a case to be tried to the court. In *Johnson v. McPhee,* ___ Idaho ___, ___ P.3d ___ (Ct. App. 2009), the court stated:

> On review of an order granting summary judgment, this court uses the same legal standard as that used by the trial court. *Friel v. Boise City House. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994); *Washington Fed. Sav. & Loan Ass'n v. Lash*, 121 Idaho 128, 130, 823 P.2d 162, 164 (1992). Summary judgment may be entered only if "the pleadings, deposition, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Idaho Rule of Civil Procedure 56(c). *See also Avila v. Wahlquist*, 126 Idaho 745, 747, 890 P.2d 331, 333 (1995); *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 742, 890 P.2d 326, 328 (1995). When a summary judgment motion has been supported by depositions, affidavits or other evidence, the adverse party may not rest upon the mere allegations or denials of that party's pleadings, but by affidavits or as otherwise provided in the rule, must set forth specific facts showing that there is a genuine issue for trial. I.R.C.P. 56(e). *See also Gardner v. Evans*, 110 Idaho 925, 929, 719 P.2d 1185, 1189 (1986). In order to survive a motion for summary judgment the plaintiff need not prove that an issue will be decided in its favor at trial; rather, it must simply show that there is a triable issue. *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 524, 808 P.2d 851, 861 (1991). A mere scintilla of evidence or only a slight doubt as to the facts is insufficient to withstand summary judgment; there must be sufficient evidence upon which a jury could reasonably return a verdict for the party opposing summary judgment. *Corbridge v. Clark Equip. Co.*, 112 Idaho 85, 87, 730 P.2d 1005, 1007 (1986); *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969).
>
> When a court considers a motion for summary judgment in a case that would be tried to a jury, all facts are to be liberally construed, and all reasonable inferences must be drawn in favor of the party resisting the motion. *G & M Farms*, 119 Idaho at 517, 808 P.2d at 854; *Sanders v. Kuna Joint School Dist.*, 125 Idaho 872, 874, 876 P.2d 154, 156 (Ct. App. 1994). The rule is different however when, as here, a jury trial has not been requested. In that event, because the court would be the fact-finder at trial, on a summary judgment motion the

court is entitled to draw the most probable inferences from the undisputed evidence properly before it, and may grant the summary judgment despite the possibility of conflicting inferences. *P.O. Ventures, Inc. v. Loucks Family Irrevocable Trust*, 144 Idaho 233, 237, 159 P.3d 870, 874 (2007); *Intermountain Forest Mgmt., Inc. v. Louisiana Pacific Corp.*, 136 Idaho 233, 235, 31 P.3d 921, 923 (2001); *Brown v. Perkins*, 129 Idaho 189, 191, 923 P.2d 434, 436 (1996). Inferences thus drawn by a trial court will not be disturbed on appeal if the record reasonably supports them. *Shawver v. Huckleberry Estates, L.L.C.*, 140 Idaho 354, 360-61, 93 P.3d 685, 691-92 (2004); *Intermountain Forest Mgmt., Inc.*, 136 Idaho at 236, 31 P.3d at 924.

B. The District Court did not Err in Finding Spectra Site's Landlord had the Right to Use the Access Road pursuant to Various Easement Theories

On remand, the trial court was advised by this Court's previous decision that Tower, as lessee of Hall, had standing to seek injunctive relief preventing Lawrence from interfering with its alleged right to use the easement, but lacked standing to seek to quiet title to the easement itself. This Court stated; "we agree with the Restatement (Third) of Property that an individual has standing to enforce the right to use an easement if he or she has the right to benefit from the easement. Restatement (Third) of Property: Servitudes § 8.1 (2000). Therefore, title ownership of the dominant estate is not a necessary prerequisite to obtain standing to enforce the right to use an easement." *Tower Asset Sub Inc v. v. Lawrence*, 143 Idaho 710, 152 P.3d 581, 584 (2007).

The trial court observed in its memorandum opinion that at the time of the first appeal, footnote 1 reflected that this Court was of the opinion that Tower had submitted uncontroverted evidence that the Hall parcel was intended to have the benefit of the access road easement

across the Lawrence parcel. Lawrence contends the trial court should not have utilized footnote 1 in its analysis of the issues on remand.

The trial court did not rule that this foot note comment by the Supreme Court relieved Spectra Site of proving that its landlord, Hall, had an easement right of which it could claim the benefit. The trial court merely observed that this Court observed that at time of its first opinion on appeal tat Tower had presented uncontroverted evidence in the record before it that the Hall parcel was intended to have the benefit of the access road.

The trial court's opinion was issued jointly in the present case and the Capstar case (Supreme Court Docket No. 35120) and recognized that Tower asset its motion for summary judgment based on the remaining easement theories raised in its complaint. In the jointly issued opinion, the trial court reviewed the chain of title and the evaluated the intent expressed in the sales agreement of the Lawrence property that Funk's remaining property. The trial court found would continue to have the right to traverse the access road across the Lawrence parcel for access to the retained Section 22 property. The trial court incorporated its previous analysis of the three easement theories from the Capstar discussion portion of its memorandum. Most importantly, the trial court concluded Hall had the same easement rights, and Spectra Site, as its tenant, could use them.

The trial court's comment regarding the evidence in the record on summary judgment was for the benefit of indicating that there was nothing presented to the trial court in opposition to the renewed motion for summary judgment that controverted the other easement theories discussed in this Court's footnote. The trial court noted that its previous discussion in its

Capstar analysis addressing the theories of implied easement, easement by necessity and prescriptive easement was equally applicable to Spectra Site. Supp R p. 652. Thus, the trial court engaged in the proper analysis on the separate easement theories and did not commit error.

C. The District Court did not Err in Considering the Easement Theories as Grounds for Summary Judgment

In a related argument, Lawrence claims that the proper causes of action were not before the trial court. Lawrence claims Spectra Site pursued the wrong theories, citing to a portion of Spectra Site's brief and implying that Spectra Site was seeking to quiet title to an easement. This argument is without merit for the following reasons.

First, in its memorandum in support of the renewed motion for summary judgment, Spectra Site cited the holding of this Court that "Tower will have standing to seek injunctive relief if it can establish it has an alleged legal right to benefit from the Blossom Road easement. As lessee of the alleged dominant estate, Tower derives its right to use the alleged easement from its lessor, Hall." R p.24. The memorandum proceeded to discuss the easement rights Hall had in the road under theories of implied easement, easement by necessity and prescriptive easement. It concluded: "For the foregoing reasons and under the foregoing legal theories, the Court should grant Plaintiff's motion for summary judgment and issue a permanent injunction prohibiting Defendants from further blocking Plaintiff's access." It did not seek a quiet title in its favor.

Next, the trial court recognized that Spectra Site sought relief consistent with this Court's first opinion. The trial court held: "Tower Asset has proven they are entitled to injunctive relief, as their landlord, the Halls, have an easement over Lawrences (sic) land established by prior use, by necessity and by prescription and Lawrences have failed to establish a material fact in dispute as to any of these theories." R pp. 653-654.

Lawrence argues that this Court's previous decision stands for the proposition that Spectra Site was precluded from arguing that their land was burdened by a servitude under any easement theory absent a prior quiet title action by Hall establishing these rights. Lawrence cites to no legal authority for this argument on appeal.

More importantly, existing legal authority contradicts this position. "Any one rightfully in possession of the premises to which an easement is appurtenant may maintain an action for injury to or disturbance thereof. Accordingly, it has been held that a lessee or a tenant at will may maintain the action." 28A C.J.S. Easements § 258.

The issues before the trial court were: (1) was Spectra Site rightfully in possession of the premises (dominant estate); and (2) did Spectra Site's landlord have an appurtenant easement based upon the theories of implied easement, easement by necessity or prescriptive easement. The trial court was correct when it determined that there was no question of fact that Spectra Site was rightfully in possession of the dominant estate and that Halls had an easement appurtenant based upon all three easement theories.

Lastly and in the alternative, if Lawrence was correct and the previous Supreme Court opinion precluded any further discussion of Hall's easement rights on remand, then the

alternative question must be asked as to the law of the case as established in the first appeal. This Court found that it was established at the time of the first appeal that Tower was a tenant of Hall. Its foot note indicated that the record on appeal was uncontroverted that Hall had an easement right. On remand, the trial court held that the lease was for use of the dominant parcel, and required access. Thus, if Lawrence's logic is followed and the remand was not intended to require Tower to establish Hall had easements appurtenant under the remaining easement theories, then the trial court properly granted summary judgment based upon the law of the case as established on appeal.

D. Lawrence does not Support their Claim that there were Genuine Issues of Material Fact Regarding the Various Easement Theories

Without any recitation to the record, Lawrence claims on appeal that the court summarily dismissed their evidence and completely ignored contradictory evidence. The facts cited in support of this argument is that the court misspoke when it said Nextel assigned the Access License Agreement to Capstar, when in fact the Access License agreement was assigned to Tower. The other fact recited by Lawrence is an error in the Capstar discussion about the years Funk used the easement road after the sale of the Lawrence parcel. Lawrence does not expand thier argument on how these two items would create a genuine issue of material fact or change the outcome of the summary judgment proceeding.

At the trial court level, Lawrence's argument only addressed the element of adverse use. Lawrence claimed Spectra Site had not established adversity because use of the road by Tower

was permissive based upon their interpretation of the affidavit of Rebeor.[2] Supp R Vol. I, p. 173. The trial court rejected this argument. Lawrence provided no argument or contradictory facts on appeal indicating error in the trial court's analysis.

Lawrence also argued to the trial court that use of the access road was not prescriptive because it was in common with Lawrence. Supp R Vol. I, p. 177. The trial court rejected this argument. Lawrence did not expand this argument.

In the recent case of *Backman v. Lawrence,* ___ Idaho ___, ___ P.3d ___ (2009 Opinion No. 68) this court reiterated that "Idaho Appellate Rule 35, which governs the content of briefs on appeal, requires that '[t]he argument . . . contain the contentions of the appellant with respect to the issues presented on appeal, *the reasons therefor, with citations to the authorities,* statutes and parts of the transcript and record relied upon.' I.A.R. 35(a)(6) (emphasis added). Furthermore, this Court has held that issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered. *Hall v. Farmers Alliance Mut. Ins. Co.*, 145 Idaho 313, 323, 179 P.3d 276, 286 (2008)."

On appeal, Lawrence provides no argument or facts why these finding were in error. They merely invite this Court to search for error based on their allegations of such.

E. The District Court did not Err in Rejecting Defendants' Laches and Statute of Limitation Claims

Lawrence argues on appeal that Spectra Site was required in its complaint to allege that it would be relying upon easement rights established by its predecessors in interest in order to

[2] It does not appear Lawrence included this affidavit in the appellate record.

proceed with its suit. Lawrence presents no case law or argument why this statement supports a claim of laches. Further, Spectra Site's complaint did claim its predecessors in title had used Blossom Mountain Road as it crossed the Defendants' real property for access to Hall's real properly openly, notoriously, continuously, adversely and under claim of right for a period exceeding five (5) years. R p. 011.

Lawrence also challenges the trial court's finding that there was no evidence in the record before it justifying application of the doctrine of laches. On appeal, Lawrence claims they were prejudiced because the severance occurred nearly 33 years ago without any further explanation or argument. This argument was not presented to the trial court. It is difficult to ascertain on appeal the prejudice Lawrence claims to have suffered. A response is not possible to a non-existent argument.

Although contained in its statement of the issue, Lawrence did not present argument on the error it claimed the trial court made in relation to their statute of limitation defense. This Court has consistently indicated it will not consider assignments of error not supported by argument and authority in the opening brief. *Jorgenson v. Coppedge,* ___ Idaho ___, 181 P.3d 450 (2008).

F. The District Court did not Err in Striking Portions of the Affidavits Filed by Lawrence

Lawrence contends the trial court erred in striking portions of their affidavits while leaving intact those affidavits submitted by Capstar. Despite this general complaint regarding the amount of material submitted and stricken, Lawrence presents no case law or argument why

this Court should find on appeal that the trial court abused its discretion. Again, this Court should not consider this issue on appeal absent being presented argument and legal authority.

G. The District Court Properly Considered and Ruled Upon Lawrence's Motion to Disqualify for Cause

Lawrence argues avidly that the district judge should have disqualified himself. Lawrence claims the trial court's impartiality could reasonably be questioned.

When a court is faced with a motion to disqualify for bias or prejudice under I.R.C.P. 40(d)(2), the trial judge need only conclude that he can properly perform the legal analysis which the law requires of him. *State v. Pratt,* 128 Idaho 207 (Ct. App. 912 P.2d 94 (1996). Adverse rulings in the case do not disqualify the judge; in order to be grounds for disqualification, bias must stem from the judge forming opinion on merits of case on some basis other than what has been learned from presiding over it. *Desfosses v. Desfosses,* 122 Idaho 634, 836 P.2d 1095 (Ct.App. 1992); *Bell v. Bell,* 122 Idaho 520, 835 P.2d 1331 (Ct.App. 1992); *Samuel v. Hepworth, Nungester & Lezamiz, Inc.*, 134 Idaho 84, 996 P.2d 303, (2000).

In order for disqualification to be appropriate under I.R.C.P. 40(d)(2)(A)(4), the alleged prejudice must stem from an extra-judicial source. *Dept. of Health and Welfare v. Doe,* 133 Idaho 826, 992 P.2d 1226 (Ct. App.1999). Any such disqualification for cause shall be accompanied by an affidavit of the party or the party's attorney stating distinctly the grounds upon which disqualification is based and the facts relied upon in support of the motion. Rule 40(d)(2)(B). The moving party bears the burden of providing facts to support the stated grounds for disqualification and suspicion, surmise, speculation, rationalization, conjecture,

innuendo, and statements of mere conclusions may not be substituted for a statement of facts. *DesFosses v. DesFosses,* 120 Idaho 27, 813 P.2d 366 (Ct.App.1991).

In support of this argument, Lawrence claims that over the course of the litigation, it was their perception that the judge disregarded meritorious arguments made by them. They also cite to the fact that the judge disqualified himself without cause in a former case involving their legal counsel at the time (John Whelan). Lawrence also argues that the fact that the court took the motion to disqualify under advisement and then issued a written opinion was a clear indicator that the court was no longer impartial and had a stake in the proceedings. Lawrence also takes umbrage with rulings with which they disagreed in this case and the case with Capstar. Lawrence argues on appeal that rulings favorable to Spectra Site demonstrate that the district judge was "just a tool of these corporations."

Finally, Lawrence claims that the evidentiary rulings made on motions to strike display the district judge's prejudice against them. However, as noted in the previous section, Lawrence cites to no evidentiary rule or case in support of the claim that the trial court committed error in striking portions of their submitted affidavits. On summary judgment, a trial court is only allowed to consider admissible evidence. *Posey v. Ford Motor Credit Co.*, 111 P.3d 162 (Idaho Ct.App. 2005). Lawrence provides no argument that the stricken portions of affidavits were admissible evidence, or that the trial court abused its discretion in striking the affidavit testimony.

The trial court issued a thorough opinion that enunciated its reasons for denying Lawrence's motion for disqualification for cause. Supp R Vol. II, pp. 95-120. This

memorandum sets forth the reasons the trial court refused the motion and clearly addressed the concerns raised by Lawrence to the trial court. The evidentiary rulings made by the trial court were supported by the rules of evidence. The main foundation of the alleged error is that the trial court issued adverse rulings with which Lawrence disagreed.

The final ground upon which Lawrence appeals is that the trial court looked outside the record into those cases raised by Mr. Whelan as being ones in which the court demonstrated prejudice against him. Lawrence deems this an inappropriate independent investigation by the trial court.

The Court informed counsel it did not have a recall of one of the cases discussed at hearing but not raised in the brief and that it would look at it and the other cases cited in the brief. Tr p. 26, Ll. 6-17. Lawrence's counsel did not express an objection to that process. Lawrence argues it was improper for the trial court to consider these cases and discuss them in its opinion. These were cases referenced by Lawrence's attorney from which alleged prejudice could be determined. Lawrence cites to no case authority that it was improper for a trial court to review these cases to refresh the trial court's recall in order to give due consideration to Lawrence's argument that actions occurred in the cases that could cause an appearance of bias. Further, Lawrence presents nothing to support his claim that it was improper for a court to take a matter under advisement and issue a written opinion.

V. ATTORNEY FEES ON APPEAL

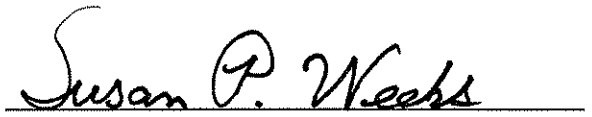
Lawrence seeks attorney fees on appeal because they perceive Spectra Site to be part of a large corporate conglomerate and that it has engaged in a conspiracy to take his property rights. This request does not comport with I.A.R. 41. To the extent that this could be deemed a claim for attorney fees pursuant to I.C. 12-121, Spectra Site has not pursued its defense of this appeal frivolously.

VI. CONCLUSION

On appeal, Lawrence has failed to establish that the trial court committed reversible error. Spectra Site submits that the trial court's decision should be affirmed.

SUBMITTED this 22nd day of May, 2009.

JAMES, VERNON & WEEKS, P.A.



SUSAN P. WEEKS
Attorneys for Plaintiff/Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of May, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to all counsel of record as follows:

Douglas & Brenda Lawrence
2925 N. Webster Street
Coeur d'Alene, ID 83815

- ☑ U.S. Mail
- ☐ Hand Delivered
- ☐ Overnight Mail
- ☐ Telecopy (FAX)

Susan P. Weeks